

fering. And I want a Supreme Court Justice to empathize with those people who are struggling in our society.

So if you would agree to do that, I would appreciate it.

Judge BREYER. I will.

Senator SIMON. And I have no further questions or comments, Mr. Chairman.

The CHAIRMAN. I thank you very much, Senator.

With Senator Brown here, I know that it is a little bit longer. Senator Brown says he does not have a full round. I think, because there is going to be a vote shortly, if you can persist a while longer, I would like to yield to Senator Brown now, and maybe we can finish up here.

Judge BREYER. Yes.

The CHAIRMAN. Senator Brown.

Senator BROWN. Thank you.

Judge Breyer, my commendation. You have survived our trial by inquiry quite well.

Judge BREYER. Thank you, Senator.

Senator BROWN. I do not know if it is comparable to trial by combat that the common law must have thought about, but you have not only survived, you have prospered. I think Members from both sides of the aisle have been most impressed not just with the quality of your answers but with the thought process that goes into it.

Judge BREYER. Thank you.

Senator BROWN. I listened intently to the queries that were addressed to you about your book. I know you have written in a number of publications, but specifically "Breaking the Vicious Circle" I assume was a series of lectures?

Judge BREYER. Yes, that is right, Senator.

Senator BROWN. Put out in a book form.

Judge BREYER. Yes.

Senator BROWN. I read through that with what I hoped was a searching eye to find out your position on issues, and I did not find admonitions as to what our policy should be. What I found was an urging that we understand the risk we are trying to address and that we set priorities of what is most important to us since we have limited resources.

Is that a fair summary of what you tried to do?

Judge BREYER. I think it is. That is what I was trying to do in various ways, to make as clear as I can some of the problems of maybe spending too much here and not enough there. And if people think about that and then the public and people who read it or anyone else in the world who is interested in this area decides that is what we would like to do, that is the end of the matter. All it does is it calls this to people's attention. They are to think about it. And if we can think of a way that people would prefer, other people, not me—I am the one calling it to their attention. If they then think that is how they would like to proceed, fine. That is up to other people, groups who know more about it than I do, calling it to the attention of Congress, who then may decide to do something different or may not.

Senator BROWN. Well, I noticed you analyzed the cost of a 95-percent cleanup and analyzed the cost of the additional 5-percent cleanup and compared it with the potential good that each did. But

I did not find that you advocated not doing the last 5-percent clean-up.

Judge BREYER. No, I did not. I said look at the problem. Look at the problem, here are some suggestions as to how one might talk to Congress. If you think it is a problem, I do not guarantee this is the solution. I do not guarantee there is a solution. But I do see this as a problem that is worth talking about.

Senator BROWN. I want to draw your attention for a moment to the fourth amendment, and I suspect you have these all memorized, but let me just read the language.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and it goes on. Unreasonable searches and seizures is the operable phrase.

We had a proposal before Congress relating to requiring public housing to be open to search, and presumably seizure if illegal items are found therein. You have looked at fourth amendment cases and ruled on one specifically where you dissented from others on the panel.

Does what is reasonable vary depending on the proprietary interest in the residence? Specifically, is what is a reasonable search of someone's home that they own different from what is a reasonable search of a hotel room that you rent? Are either of those different from a public housing unit that you rent? Does the standard of what is a reasonable search and seizure vary with your ownership interest?

Judge BREYER. I think what happens under that is, of course, there has to be a privacy interest of the person who is complaining in any of the three. And then I think under this idea of unreasonableness or reasonableness, the Supreme Court has cases that, in general terms, describe circumstances in which something is or is not reasonable. And my thought would be that those general descriptions do not vary, but what might vary are the circumstances that bring something within or without.

That is how I think it probably works.

Senator BROWN. You focus on the circumstances, not necessarily the particular proprietary interest.

Judge BREYER. That could be part of the circumstance. I would not say never.

Senator BROWN. I wanted to draw your attention also to a controversy that now rages over term limitations. The question is kind of interesting. It relates—

The CHAIRMAN. The answer to this question could be very important. [Laughter.]

I just want you to know that. Look up here and determine how many people have been here two or more terms and how many have not. Let your conscience be your guide. [Laughter.]

I want the record to show people are laughing. That is meant to be a joke. It is late in the day. But go ahead.

Senator BROWN. Let the record show that those over two terms did not laugh as much as those under. [Laughter.]

It is a fascinating question because it is based upon provisions of the Constitution giving Congress the power to regulate itself in

contrast to the provisions allowing States to set qualifications for elections.

Have you articulated publicly or privately a position on term limitations?

Judge BREYER. I do not think so.

Senator BROWN. Have you come to a judgment in your own mind as to whether it is a good policy or not?

Judge BREYER. I would say, Senator, that I have been preparing pretty hard for these hearings over the last few weeks. I have not read the papers every day. I have not noticed every case that the Supreme Court has decided to decide next term. But I did notice one.

Senator BROWN. Well, I do not ask you how you would rule on that case. [Laughter.]

What your preferences might be is significantly different than how you would rule on a legal question. I do note that with your home being in California originally, you may have an opinion on the term limits referendum that was on the California ballot a few years ago. I thought I would inquire if you have an opinion on the wisdom of term limits.

Judge BREYER. As you can see, on this one, when other people laughed, I have laughed. I have made no indication with my head one way or the other. I do not think that I have particularly smiled out of place. And I think that that is where I would like to leave it, if that is all right.

Senator BROWN. I have noticed that you would make an excellent poker player, or that at least I should not play with you.

For what it is worth, this issue is not overwhelmingly popular in this body. However, we are often faced with difficult policy decisions. Occasionally, someone will say, you must have decided never to run for reelection to vote for that particular measure. Yet, the difficult choice is often the right choice. Perhaps term limits could help us make the right choice.

My own conviction is that there are a lot of things that we ought to be doing that we do not do. Reducing the deficit is a good example. The term limits case is one that could well go either way; there are excellent arguments on either side. I envy your opportunity to review that case and I hope your deliberations will include a consideration of how terribly important it is to this country that we have people who serve in Congress who are willing to do things that could never get them reelected.

The last item I want to turn to is religious freedom. My understanding from what reading I have done in history is that the establishment clause, while it had a number of origins, really came about because some colonies like Virginia had an established religion. The practice was to tax people and use some of that tax money to support the Church of England, the Episcopal Church. Some of the poor Scotchmen that came to this country later than the English Anglicans were forced to pay taxes to support the Church of England. That was why Thomas Jefferson was so focused on this issue. It is why he was so proud of his efforts to establish religious freedom. It is important to understand that the framers viewed the establishment of a religion as an established

religion that people of all faiths were forced by their tax money to support.

The words "establishment of religion" have taken on a much broader meaning. I would be interested to know if you have a different view of the origin of the establishment clause.

Judge BREYER. I do not have a better view. I do not have a better view.

Senator BROWN. It would be a tragic mistake to allow the Government to force people to support one religion or another. It would be tragic to put people in embarrassing circumstances where, if they had a different religious belief, they were humiliated. The concern over public prayers reflects some of that.

But I am appalled that we would prohibit under the establishment clause a public prayer which someone can either listen to or ignore. The way Americans have dealt with speech or public discourse in all other areas has been to ignore it or to listen to it, not to stifle it. The idea of stopping people from making public utterances in the name of the Constitution concerns me.

If you have any comments you would like to make I would be interested in them. But I do think there is a different side to the restriction of public prayer that has not really been brought into balance at this point, and that is the freedom of speech and the freedom of expression.

Judge, thank you for what I consider to be an edifying experience. You are going to make a marvelous Supreme Court Justice, and while I suspect all of us have areas we disagree with you on, everyone that I have spoken with respects your intellect and your honesty and believes that we will have someone with great integrity on the bench.

Judge BREYER. Thank you very much, Senator. I appreciate it. Thank you.

The CHAIRMAN. Judge, the Senator from Colorado and I will have a chance to debate this, but like most things that you deal with as a judge, there are factual questions that sometimes we think we know the answer to and many times we do not. It has been my experience, being here 22 years, having observed at least 25 Senators who have announced their retirement at least a year in advance, I have not noticed a single one that I can recall where they have changed their voting record.

Senator BROWN. But many that should have. [Laughter.]

The CHAIRMAN. Maybe should have. But I think it would be an interesting study for us to do to see whether or not this presumption that people do not vote courageously because they are running again, in fact, stands up to scrutiny. It would seem to me the corollary would be true. If they have decided not to run, then they would change the way in which they voted after they have decided they were not going to run again.

I am prepared to make a gentleman's bet that we would find that that is as much an exception as the woman or man who chooses to, while running again, make a courageous vote, knowing it may cost them their election. But, at any rate, that is just a little aside, because I know you have nothing else to think about, and I am sure it is of no relevance.